Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 87-1737

IN THE SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,

Respondent

versus

DAVID G. BUCKNO,

Petitioner

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA - EASTERN DISTRICT

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I. QUESTIONS PRESENTED FOR REVIEW

A. WAS THE DEFENDANT INITIALLY ILLEGALLY ARRESTED AND DETAINED WHEN THE VEHICLE IN WHICH HE WAS A PASSENGER WAS STOPPED BY THE POLICE ON THE BASIS OF A RADIO BROADCAST AND IF AN ILLEGAL DETENTION OCCURRED, DOES THAT ARREST OR DETENTION VITIATE THE SUBSEQUENT SUMMARY CHARGE OF DISORDERLY CONDUCT BROUGHT AGAINST HIM?

B. WAS THE DEFENDANT ILLEGALLY ARRESTED WITHOUT PROBABLE CAUSE AFTER BEING TRANSPORTED FROM THE SCENE OF HIS ORIGINAL DETENTION AND, IF SO, DOES THAT ALLEGED ILLEGAL ARREST VITIATE THE SUMMARY CHARGE OF DISORDERLY CONDUCT WHICH WAS BROUGHT AGAINST HIM?

C. ARE THE ACTIVITIES ENGAGED IN BY THE DEFENDANT WHICH FORM THE BASIS OF THE SUMMARY CHARGE OF DISORDERLY CONDUCT FILED AGAINST HIM PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA?

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II. STATEMENT OF THE CASE

During the early morning hours of February 19, 1983, Officer Charles Higgins of the Allentown Police Department was on patrol in a Police Vehicle when at approximately 3:12 a.m. he received a radio communication indicating that a robbery had occurred and that the perpetrators of the robbery, four males in a white vehicle, had fled the scene of the robbery. (A. 3) While proceeding to the scene of what was initially reported as a robbery, Officer Higgins observed a vehicle matching the description given over the radio and occupied by four males "sliding sideways through the Eighth Street underpass." and stopped the vehicle. (A. 3) One of the occupants of the vehicle was Mr. Buckno, the Petitioner herein. (A. 4) Subsequent to the stop of the vehicle, a second radio

broadcast was received by Officer Higgins and the other officers indicating that the nature of the incident underlying the initial communication was not a robbery, but rather, a "disorderly assault." (A. 4)

Mr. Buckno and his three companions were transported by the police back to the address from which the complaint was made and it was determined that there had been some type of altercation between Mr. Buckno, his companions, and two women who the four men had met earlier in the evening. (A. 5-6, 14) Officer Higgins and his partner, Officer Burns, attempted to question the two women who were the original complainants regarding the facts and circumstances of the incident and the initial radio dispatch and advised the women of their right to file a "private prosecution." (A. 6, 13-14) The conversation between the two police officers

took place in the corridor of an apartment building at approximately 3:30 a.m. (A. 7, 14) During the course of Officer Higgins' interview with the two women Mr. Buckno was "arrogant" and shouting obscenities and yelling at the women "you fucking bitches." (A. 6, 14) On several occasions Officer Higgins requested Mr. Buckno to remain quiet and he failed to do so. (A. 6) After Officer Higgins and Officer Burns completed their discussion with the two women, they proceeded outside in the company of Mr. Buckno and Officer Higgins requested Mr. Buckno to "go and get proper identification" since Mr. Buckno did not have any written verification of his identity. (A. 6) This further conversation between Officer Higgins and Mr. Buckno transpired in the parking of the apartment building where there were balconies from the building overlooking the

parking lot and other surrounding apartment buildings. (A. 7) The tone of Mr. Buckno's voice out in the parking lot was "loud." (A. 7) When Officer Higgins insisted that he needed verification of Mr. Buckno's address, he turned towards the Officer and stated "Fuck you." (A. 7) At that point in time Mr. Buckno was placed under arrest for Disorderly Conduct and Public Drunkenness.

III. SUMMARY OF THE ARGUMENT

The initial stop of the vehicle in which Mr. Buckno was a passenger and detention of the occupants of that vehicle was proper under the circumstances of this case in view of the information which the police had available to them at the time of the stop. A radio communication was received by them indicating that a robbery had occurred involving four men in a white vehicle. Shortly after that radio communication, Officer Higgins observed a white vehicle with four male occupants while he was in transit to the scene of the reported robbery. He observed the vehicle "sliding sideways through the Eighth Street underpass" at approximately 3:00 a.m. in the morning. While the initial report of a robbery proved to be false, the facts available to the

police at the time of the stop and detention were sufficient to establish probable cause. In any event, even if probable cause did not exist when the initial stop and detention were made, any illegality in the stop and detention does not vitiate the subsequent charge of Disorderly Conduct brought against Mr. Buckno.

Mr. Buckno was subsequently arrested after being transported back to the location were the events occurred which resulted in the initial police broadcast. At that location, in addition to attempting to ascertain the identity of the four male occupants including Mr. Buckno, the police interviewed the two female complainants to determine the exact nature of the incident giving rise to the radio communication of a robbery. During the course of this interview, which occurred at approximately

3:00 a.m. in the morning in the corridor of an apartment building, Mr. Buckno was loud, unruly and continued to shout obscenities in spite of instructions from the investigating officers for him to remain quiet. One of the investigating officers requested Mr. Buckno to provide verification of his identity and address in the form of documentation and his was unable to do so. The conversation between Mr. Buckno and the investigating officer, Officer Higgins, continued into the parking lot of the apartment building and Mr. Buckno continued to be loud and unruly shouting obscenities. When Officer Higgins indicated that he wished to take Mr. Buckno to his home in order to obtain proper identification, Mr. Buckno shouted "Fuck you" and Officer Higgins placed him under arrest for Disorderly Conduct and Public Drunkenness.

Taken as a totality, Mr. Buckno's conduct on the evening in question both inside the apartment building as well as outside in the parking lot established probable cause for his arrest on the charge of Disorderly Conduct. However, even if one assumes for the sake of argument that Mr. Buckno's "arrest" occurred by virtue of Officer Higgins's insistence that Mr. Buckno return to his home to produce proper identification, and if one assumes further that this "arrest" was without probable cause, the illegality of the police conduct does not nullify the validity of the summary charge of Disorderly Conduct since the controlling decisions of this Court do not call for dismissal of the criminal charges of a defendant because of an illegal arrest.

The conduct engaged in by Mr. Buckno on the night in question is not conduct

protected under the First Amendment of the United States Constitution. The facts indicate that at approximately 3:30 a.m. for a period of approximately fifteen minutes Mr. Buckno engaged in a course of loud and unruly behavior inside the corridor of an apartment building and outside the apartment building in the parking lot. During the course of this episode, he shouted obscenities at no one in particular and also directed obscenities at the two female complainants who were being interviewed by the investigating police officers. Focusing upon one vignette of this entire incident occuring between Mr. Buckno and Officer Higgins, the Petitioner attempts to ignore the entire course of conduct he engaged in on the evening in question. Under the applicable decision of this Court, the loud and unruly behavior engaged in by Mr. Buckno is not

protected by the First Amendment and, therefore, the citation issued to him for Disorderly Conduct was justified.

IV. ARGUMENT

The initial stop of the automobile and detention of its occupants was based upon a radio communication received by Officer Higgins. On February 19, 1983, at approximately 3:00 a.m. in the morning, Officer Higgins received a radio communication indicating that a robbery had occurred and that the perpetrators were four males in a white vehicle. (A. 3) Officer Higgins proceeded to drive towards the area of the reported robbery and while he was proceeding to that location he observed a vehicle matching the description given over the radio with four male occupants driving erratically. (A. 3) On the basis of that information, Officer Higgins and his fellow police officers stopped the vehicle occupied by Mr. Buckno and detained all four

occupants.

The determination of whether or not probable cause existed for the stop of the vehicle in question and detention of its four occupants must be based upon the collective knowledge of all the police officers involved in this transaction. The information available to Officer Higgins immediately prior to the stop was the location of an alleged robbery, the description of a vehicle, the number of perpetrators allegedly involved in the robbery and the gender of the perpetrators. Shortly after receiving the radio communication and while proceeding to the scene of the alleged robbery, Officer Higgins observed a vehicle matching the description of the vehicle given out in the radio report and that vehicle was being operated in an erratic fashion. Under these circumstances, Officer Higgins properly

relied on the radio communication to make the stop and that radio communication provided probable cause for both the initial stop of the vehicle as well as the initial detention of its occupants. United States v. Taylor, 797 F.2d 1563 (11th Cir. 1986); United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985); United States v. Birmley, 529 F.2d 103 (6th Cir. 1976).

In the instant case, the initial report of a robbery as made by the complaintants to the police was untrue. (A. 9) However, the record indicates that a robbery complaint was actually made to the police and the police in reliance on that robbery complaint made the radio dispatch which resulted in the stop and detention of Mr. Buckno and his three companions. The good faith reliance of the police upon a report by a private citizen as to the occurrence to a robbery should not

flaw an otherwise valid stop and detention if the individuals stopped and detained meet the description of the suspects identified in the radio communication.

Moreover, even if the original stop and detention was without probable case, an illegal arrest does not bar a subsequent prosecution or prevent a subsequent conviction. United States v. Crews, 445 U.S. 463, 474, 100 S.Ct. 1244, 1251, 63 L.Ed.2d 537, 547 (1980); Gernstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 865, 43 L.Ed.2d 54, 68 (1975). In United States v. Crews, Supra, this Court had before it a case in which the appellant argued that his illegal arrest barred his prosecution because his presence during the proceedings against him resulted from the illegal arrest. In rejecting this argument, this Court wrote:

> "An illegal arrest, without more, has never been viewed as a bar to subsequent

prosecution, nor as a defense to a valid conviction." Crews, supra at 547.

In Gernstein v. Pugh, supra, this Court had before it a case in which the respondents by way of a class action challenged the procedures of the State of Florida in making an initial determination of whether probable cause to arrest existed in a given case. While the challenged Florida procedures were found to be unconstitutional, this Court noted that the arrest of a defendant without probable cause "does not void a subsequent conviction." Gernstein v. Pugh, supra at 68. Therefore, in the instant case, even if one assumes for the sake of argument that the initial stop in detention of Mr. Buckno was constitutionally infirm, that infirmity does not invalidate his subsequent conviction on the summary charge of Disorderly Conduct.

After Mr. Buckno and his companions were

stopped and detained, they were transported by members of the Allentown Police Department back to the apartment of the two female complainants who falsely reported a robbery. At the time the men were taken back to confront the women, Officer Higgins was of the understanding based upon a later radio broadcast that the incident involved a "disorderly assault." (A. 4) After arriving at the apartment, the police officers interviewed the two female complaintants in an effort to determine exactly what had occurred. During the course of that interview, which occurred in a public corridor of the apartment building, Mr. Buckno yelled obscenities towards the female complaintants as well as towards no one in particular. (A. 6, 14) After the police officers completed their interview of the two women, Officer Higgins attempted to get

written verification from Mr. Buckno of his identity and address and he indicated to them that he did not have such identification on his person. (A. 6) The conversation continued outside the apartment building in the parking lot and the police indicated to Mr. Buckno that they wanted to take him to get proper identification. (A. 6) He responded loudly with further obscenities in the parking lot outside the apartment building and eventually told Officer Higgins "Fuck you." (A. 7) At that point in time, Mr. Buckno was placed under arrest for Disorderly Conduct and Public Drunkenness. (A. 7)

The summary offense of disorderly conduct is defined at Section 5503 of the Crimes Code of the Commonwealth of Pennsylvania, 18 Pa. C.S.A. Section 5503, as follows:

> "(a) Offense defined.-A person is guilty of disorderly conduct if, with intent to cause public inconvenience,

annoyance or alarm, or recklessly creating a risk thereof, he:

(1) engages in fighting or threatening, or in violent or tumultuous behavior;

(2) makes unreasonable noise;

(3) uses obscene language, or makes an obscene gesture; or

(4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

(b) Grading.-An offense under this section is a misdemeanor of the third degree if the intent of the actor is to cause substantial harm or serious inconvenience, or if he persists in disorderly conduct after reasonable warning or request to desist. Otherwise disorderly conduct is a summary offense.

(c) Definition.-As used in this section the word "public" means affecting or likely to affect persons in a place to which the public or a substantial a substantial group has access; among the places included are places of business or amusement, any neighborhood, or any premises which are open to the public.

The citation issued to Mr. Buckno references all four subdivisions of subsection (a). The

above cited statutory provision has been interpreted by the courts of the Commonwealth of Pennsylvania to permit a conviction for disorderly conduct in the absence of specific intent to create public inconvenience, annoyance or alarm if the actor's conduct recklessly creates a risk of causing such public inconvenience, annoyance or alarm. Commonwealth v. Kidd, 296 Pa. Super. 393, 442 A.2d 826 (1982); Commonwealth v. Hughes, 270 Pa. Super. 108, 410 A.2d 1272 (1979). In the instant case, Mr. Buckno engaged in the shouting of obscenities in the public corridor of an apartment building at approximately 3:30 a.m. in the morning and later continued shouting those obscenities in the parking area immediately outside the apartment building. Under these facts, Officer Higgins clearly had probable cause to arrest Mr. Buckno for disorderly conduct.

The Respondent appears to contend in the alternative that his arrest occurred sometime prior to the final words in the parking lot because Officer Higgins requested that Mr. Buckno accompany him to his home in order to obtain proper identification. Assuming for the sake of argument that Respondent's characterization of when his arrest occurred is correct, and assuming further that his contention that the arrest was without probable cause, under the decisions of this Court in Gernstein v. Pugh, supra, and United States v. Crews, supra, the illegal detention of Mr. Buckno does not invalidate the charge of Disorderly Conduct brought against him by Officer Higgins.

The parameters of the constitutional protection to be afforded to an individual under the First Amendment in the type of situation presented by the instant case have

been set forth by this Court in the prior decisions of Houston v. Hill, 482 U.S. _____, 96 L.Ed.2d 398, 107 S.Ct. _____, Gooding v. Wilson, 405 U.S. 518, 31 L.Ed.2d 408, 92 S.Ct. 1103 (1972), Chaplinsky v. New Hampshire, 315 U.S. 568, 86 L.Ed 1031, 62 S.Ct. 766 (1942). It should be noted initially that in this case Mr. Buckno is not presently challenging the constitutionality of the statute under which he was convicted and he has not raised such a challenge at any prior point in these proceedings before the State Trial and Appellate Courts.

In seeking to persuade this Court to review the alleged First Amendment issue, the Respondent appears to argue in the alternative that the statement "Fuck you" made by Mr. Buckno to Officer Higgins in the apartment complex parking lot is protected under the First Amendment and, therefore,

cannot be the basis for his prosecution and/or the evidence relating to the foregoing utterance is insufficient to sustain the conviction. The second contention does not raise an issue of Constitutional diminsions and, therefore, does not provide a basis for review by this Court. The second argument advanced by Mr. Buckno is related to the first in that he attempts to limit the focus of the inquiry in this case to the momentary exchange between himself and Officer Higgins in the parking lot of the apartment complex while ignoring the fifteen to twenty minutes of unruly and boisterous conduct which preceeded the incident between himself and Officer Higgins in the parking lot. If the incident in question is viewed as a totality, it is clear that the conviction was consistent with the evidence presented and not violative of any constraints arising from

the First Amendment of the United States Constitution.

In Houston v. Hill, supra, this Court noted: "The freedom verbally to challenge police action is not without limits, of course; we have recognized that 'fighting words' which 'by their very utterance inflict injury or tend to incite an immediate breach of the peace' are not constitutionally protected." Houston v. Hill, supra, at 413, n.10. In Commonwealth v. Pringle, 304 Pa. Super. 67, 450 A.2d 103 (1982), the Superior Court of Pennsylvania examined language similar to that used by Mr. Buckno in light of the decisions of this Court relied upon by the Respondent. Specifically, in the Pringle case, the defendant referred to the police officers as "goddamn fucking pigs." Pringle, supra, at 105. The Superior Court went on to write that "[e]ven if the words in issue

would not be considered obscene, they certainly constituted 'fighting words' and created a risk of public inconvenience, annoyance, alarm and the incitation of lawless behavior." The Superior Court went on to cite the Chaplinsky decision of this Court in support of its conclusion that the language utilized by the defendant constituted "fighting words."

In the instant case, the conduct of Mr. Buckno cannot be viewed in a vacuum. As is clear from the facts of this rather brief incident as discussed at length above, Officer Higgins' decision to cite Mr. Buckno for the summary offense of Disorderly Conduct was precipitated not only by the brief exchange in the parking lot, but rather, resulted from a continuous course of conduct engaged in by Mr. Buckno for a period of approximately twenty minutes prior to Officer

Higgins informing him that he was under arrest for Disorderly Conduct. The continued course of conduct of Mr. Buckno under the circumstances of this case is not the type of verbal expression examined by earlier decisions of this Court where the use of language similar to that employed by Mr. Buckno was found to be entitled to First Amendment protection. Compare: Hess v. Indiana, 414 U.S. 105, 38 L.Ed.2d 303, 94 S.Ct. 326 (1973); Cohen v. California, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. 1780 (1970). For these reasons, none of the decisions of any of the state courts considering this matter are inconsistent with the prior decisions of this Court with respect to the First Amendment issue which the Respondent attempts to raise herein.

V. CONCLUSION

Under the facts of this case, the state courts considering this matter have not rendered a decision on any issue which is in conflict with any prior decision of this Court. And, on the contrary, the decisions of the state courts considering this matter on all levels are consistent with the prior decisions of this Court. Moreover, this case presents no hitherto unresolved issue of law justifying the exercise by this Court of its discretion to consider Respondent's appeal. The facts indicate that in both instances Mr. Buckno's detention by the police was proper and even if his detention was determined to be illegal on one or both occassions, such alleged illegality does not vitiate his conviction for the summary offense of Disorderly Conduct. The First Amendment

issue which Respondent attempts to raise is in reality a challenge to the sufficiency of the evidence presented to the trial court below and, therefore, does not justify review by this Court under the applicable rules and law. It is therefore respectfully requested that Respondent's Petition for a Writ of Certiorari be denied.

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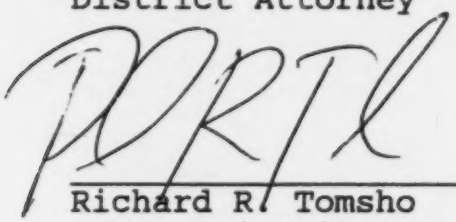
District Attorney



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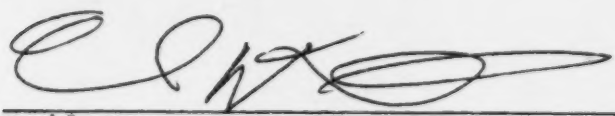

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